

REMARKS

State of the Claims

Claims 1-20 are pending.

Specification

The Examiner states that the title of the invention is not descriptive. The Examiner states further that a new title is required that is clearly indicative of the invention to which the claims are directed.

Applicants' title is the following: SUBSTANTIALLY TRIANGULAR-SHAPED OVER-CAP. Also, Applicants claim a substantially triangular-shaped over-cap.¹ Applicants' specification is replete with discussion and detailed explanation about Applicants' substantially triangular shaped over cap; e.g., "The over-caps according to the present invention are substantially triangular-shaped and are adapted to cover a similarly substantially triangular-shaped end (e.g., an open or closed end) of a container."²

Thus, Applicants' contend that in view of Applicants' figures, written specification, and claims, one of skill in the art would find Applicants' title sufficiently descriptive of the subject matter contained in the specification. Applicants point out that the Examiner has failed to provide a reason to Applicants regarding her contention, and states only that the title to the description is not descriptive. Also, the Examiner has not proposed a suitable title that might alleviate the Examiner's objection.

Applicants therefore respectfully request that the Examiner reconsider and remove the objection to the title since the Examiner has provided no reason for its lack of proper description, and since Applicants believe that it is fully descriptive, and such description is well supported by Applicants' specification, claims and figures.

¹ Applicants' Claim 1: A substantially triangular-shaped over-cap, comprising:
a) a body having a substantially triangular-shaped perimeter with three perimeter corners and three perimeter sides, the body further having an area; and
b) a skirt extending substantially continuously about the substantially triangular shaped perimeter, the perimeter having a length, the skirt including a skirt corner extending substantially downwardly from one of the perimeter corners, the skirt corner including at least one inner extension having a length and extending toward the area adjacent to the body, wherein the length of the at least one inner extension is less than about 70 percent of the length of the perimeter.

² Applicants' Specification, page 4, lines 27-29.

35 U.S.C. § 103 Rejection

Claims 1-9 and 12-20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Michaud, et al. (U.S. Patent No. 4,742,934).

The Examiner states that Michaud '934 teaches the claimed over-cap except for the length of at least one inner extension about the perimeter of the over-cap (i.e., "only that the extensions [of Michaud '934] are at the corners of the perimeter--or an intersection of points bounding the at least one extension."

The Examiner states that it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the inner extensions less than about 70% of the perimeter of the over-cap, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. The Examiner also asserts that it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the inner extensions at a distance bounded by intersecting points 20% along two intersecting imaginary lines of the over-cap.

Applicants respectfully disagree with the Examiner's assertions. First, the Examiner has provided no basis either in the references themselves or from knowledge generally available to one of ordinary skill in the art for her assertions. Instead, the Examiner merely asserts without proper basis relying therefore on her own personal knowledge. Applicants disagree with the Examiner's use of her own personal knowledge and respectfully again request that the Examiner provide an affidavit with references therein that properly establish the validity of the Examiner's assertions.

In the Examiner's office action to Applicants dated November 28, 2003, Applicants respectfully contend that the Examiner made several mistakes. First, the Examiner did not properly respond to Applicants' previous request for an affidavit based upon the Examiner's use of her personal knowledge to reject Applicants' claims.

In the office action, the Examiner states that "an affidavit is not necessary [because] [i]t can be seen in figure 2 of Michaud that the detents 52 each extend less than 70% of the perimeter of the over-cap." However, the Examiner does not point to the measure by which one may "see" that the detents of Michaud '934 are less than 70% of the perimeter of Michaud's lid; e.g., by some form of calculation or eye-ball observation. Furthermore, the Examiner does not point to a teaching in Michaud '934 that would motivate one of skill in the art to provide Applicants' element of "less than 70%" nor does the Examiner provide the resource(s) for her extemporaneous measurement. Applicants are not disposed to rely upon the Examiner's sight "to see" that the detents of Michaud '934 are less than 70% of the perimeter of the overcap and

consider the Examiner's unspoken methodology at seeing such to be well within the personal knowledge of the Examiner. Thus, Applicants' still consider the Examiner's measurement, which has not been validated by a separate reference, to be within her personal knowledge and Applicants therefore, again, request an affidavit that validates the Examiner's assertions.

To be clear, Applicants request an affidavit from the Examiner based upon two of the Examiner's assertions and not just the one statement addressed above by the Examiner. The two statements upon which Applicants requested an affidavit are the following:

- 1) That Michaud '934 provides inner extensions that are less than about 70% of the perimeter of the over-cap, and that such is readily seen from the figures of Michaud '934; and
- 2) That Michaud '93 provides the inner extensions at a distance bounded by intersecting points 20% along two intersecting imaginary lines of the over-cap.

The Examiner has not properly responded to Applicants' request for an affidavit with one or more validating references as to Applicants' two contentions noted above as was originally requested in Applicants' previous amendment dated September 4, 2003. In fact, as to Applicants' second contention above, the Examiner has not addressed Applicants' concerns therefor except to repeat, verbatim, the assertion without any allusion to Applicants' request for an affidavit validating the Examiner's personal knowledge. This is improper.

If Applicants traverse an assertion made by the Examiner, the Examiner should cite a reference in support of her position.³ When a rejection is based on facts within the personal knowledge of the Examiner, the data should be stated as specifically as possible, and the facts must be supported, when called for by the Applicant, by an affidavit from the Examiner.⁴ If the Examiner fails to provide a suitable affidavit that bolsters her reasons for rejection herein, the rejection should be withdrawn.

Given this, the Examiner should have withdrawn her rejections, at least, as to all of the claims affected by Applicants' second contention noted above (namely, Claims 16-20). If an affidavit validating the Examiner's use of her personal knowledge is not provided, the rejection as to the affected claims should be withdrawn.

Applicants also respectfully disagree that Michaud '934 teaches or suggests Applicants' over-cap as claimed. Applicants' Claim 1 provides that the skirt attached to the over-cap extends substantially continuously about the perimeter of the over-cap. In contrast, Michaud '934 teaches away from this substantially continuous extension when it states that "lid segment 38 loosely

³ 37 CFR § 104(d)(2); MPEP 2144.03.

⁴ Id.

overlies both outer wall 28 and sealing lip 30 of tray segment 20 except in corner areas A or the various points of intersection of the sidewalls of container lid 12 and container tray 10.”⁵ [Emphasis added.] Michaud’s exception teaches away from Applicants’ invention because it specifically teaches breaks in the lid segment about the container lid and cannot therefore be continuous or substantially continuous as is claimed by Applicants. In the office action responded to herein, the Examiner admits that “the skirt is not uniformly continuous”. Applicants assert that since the lid is not uniformly continuous, as is taught by Michaud ‘934 and admitted by the Examiner, it cannot therefore be substantially continuous which is claimed by Applicants.

Therefore, since Applicants contend that the Examiner has improperly used personal knowledge to make a rejection and since Applicants assert that Michaud ‘934 teaches away from Applicants’ claims, Applicants respectfully request reconsideration and allowance of Claims 1-9 and 12-20 over the Examiner’s 35 U.S.C. § 103(a) rejection.

Claims 10 and 11 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Michaud ‘934 in view of Blanchard (U.S. Patent No. 4,026,459).

Applicants respectfully disagree that Michaud ‘934 in view of Blanchard ‘459 teaches Applicants’ invention. As mentioned above, it is Applicants’ contention that the Examiner has used personal knowledge that must now be verified by affidavit to continue to be considered part of the Examiner’s rejection, and also that the combination of Michaud ‘934 in view of Blanchard ‘459 teaches away from Applicants’ invention because Michaud ‘934 specifically teaches against providing a substantially continuous skirt about the periphery of their lid.⁶ The addition of Blanchard ‘459 to Michaud ‘934 does not cure this flaw since.

In view of the reasons set forth above, Applicants contend that the combination of Michaud ‘934 in view of Blanchard ‘459 does not meet Applicants’ invention both because the combination teaches away from Applicants’ invention and also because Applicants believe that the Examiner has relied on personal knowledge to make her assertions. Therefore, Applicants respectfully request reconsideration and allowance of Claims 7 and 8 over the Examiner’s 35 U.S.C. § 103(a) rejection.

⁵ Michaud, et al. (U.S. Patent No. 4,742,934): col. 4, lines 62-66.

⁶ Id.

SUMMARY


The rejections in the Office Action have been discussed and, Applicants believe, the proper amendments have been set forth to address the rejections.

In light of both the amendments and the discussions contained herein, Applicants respectfully request reconsideration of the rejections and their withdrawal.

Issuance of a Notice of Allowance at an early date is earnestly solicited.

Respectfully submitted,

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